ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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OCTOBER TERM 1983

NO. 83-5705

ROBERT GLEN COE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was denied due process of law by the systematic exclusion of women from the grand jury pool.

2. Whether the Tennessee Death Penalty Act is unconstitutional as applied in this case because the sentence is disproportionate to the penalty imposed in similar cases.

3. Whether the petitioner was denied due process of law by the trial court's jury charge on premeditated murder after the trial court had informed counsel prior to the jury voir dire that premeditated murder would not be charged.

4. Whether the petitioner was denied an impartial jury as a result of the prosecutor's jury voir dire on the issue of insanity.

5. Whether the petitioner was denied an impartial jury by the failure of the trial court to allow individual and sequestered voir dire.

6. Whether the petitioner was subjected to double jeopardy by conviction of both felony murder and the underlying felony.

7. Whether the petitioner was denied a fair trial by the State's playing to the jury during closing argument a recording of petitioner's confession to police.

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OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 655 S.W.2d 903.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257. Respondent submits that this record does not present a substantial federal question. The judgment of the Supreme Court of Tennessee was entered on June 27, 1983. Petitioner's petition to rehear was denied on September 6, 1983. The petitioner timely filed his petition for the writ of certiorari with this Court.

STATEMENT OF THE CASE

On December 11, 1979, Petitioner Robert Glen Coe was indicted by the Weakley County, Tennessee, Grand Jury for the offenses of first degree murder, aggravated rape and aggravated kidnapping. Two motions for change of venue were granted and the trial began on February 10, 1981, in Shelby County, Tennessee. On February 26 and 27, 1981, a Shelby County Criminal Court jury found Petitioner Robert Glen Coe guilty of murder in the first degree, aggravated rape, and aggravated kidnapping. On February 28, 1981, the Shelby County Criminal Court jury found certain statutory aggravating circumstances numbered in Tenn. Code Ann. § 39-2-203 (1), (5), (6), and (7), to wit: the murder was committed against a person under twelve years of age and the Defendant was eighteen years of age or older; the murder was especially heinous, atrocious or cruel in that it involved torture; the murder was committed to avoid prosecution; and the murder was committed while the Defendant was engaged in committing and fleeing after committing aggravated rape and kid-

napping. No mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances were found and the Petitioner's penalty for the first degree murder conviction was fixed at death. His penalty on the other two offenses was set at life imprisonment.

A motion for new trial was timely filed and was subsequently overruled on April 10, 1981. New counsel was appointed to appeal the case upon direct appeal to the Tennessee Supreme Court on April 27, 1981.

On June 27, 1983, the Tennessee Supreme Court affirmed Petitioner's conviction on the three offenses and the sentences imposed, including the sentence of death.

A timely petition for rehearing was filed and on September 6, 1983, the petition was overruled.

Present counsel was substituted for appellate counsel on September 15, 1983, and upon Petitioner's motion, the sentence of death was stayed by the Tennessee Supreme Court pending application for the writ of certiorari to the United States Supreme Court.

REASONS FOR DENYING THE WRIT

Respondent submits that the Supreme Court of Tennessee correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of murder in the first degree, aggravated rape, and aggravated kidnapping and fixing his punishment at death, life imprisonment, and life imprisonment, respectively. The Supreme Court of Tennessee did not decide a federal question of substance not heretofore determined by this Court or decided such question in a way not in accord with the applicable decisions of this Court; nor did the Supreme Court of Tennessee decide a federal question in a way in con-

flict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the Court in its sound discretion should deny the writ sought here.

ARGUMENT

I.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S CONTENTION THAT HE WAS DENIED DUE PROCESS OF LAW BY THE SYSTEMATIC EXCLUSION OF WOMEN FROM THE GRAND JURY POOL.

The petitioner contends that he was denied due process of law by the systematic exclusion of women from the grand jury pool in Weakley County. In examining this complaint, the Supreme Court of Tennessee correctly concluded that the petitioner, a male, lacked standing to challenge the grand jury composition on the basis that women were systematically excluded. State v. Coe, 655 S.W.2d 903, 909-910 (Tenn. 1983); Alexander v. Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1272, 31 L.Ed.2d 536 (1972); Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977). Accordingly, this allegation does not warrant the granting of certiorari.

II.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED PETITIONER'S CONTENTION THAT HIS SENTENCE WAS DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES.

The petitioner contends that his sentence of death is disproportionate to the penalty imposed in similar cases and that the proportionality review procedure in Tennessee is constitutionally inadequate. The respondent submits that comparing petitioner's case with numerous others illustrates that imposition of the death penalty in this case does not demonstrate that

the jury was aberrant, arbitrary, or capricious. 655 S.W.2d at 913. See, e.g., State v. Johnson, 632 S.W.2d 542, 548 (Tenn. 1982). Nor is the sentencing review process established under Tenn. Code Ann. § 39-2-205 and Rule 12, Rules of the Supreme Court of Tennessee, unconstitutionally inadequate to afford a meaningful proportionality review. The Tennessee Supreme Court has compared the circumstances of the case under review with those of previous cases in which it has assessed the imposition of the death penalty and, by following this procedure, the Court has adopted the type of proportionality review constitutionally mandated. See Proffitt v. Florida, 428 U.S. 242, 258-259. See, e.g., State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981); State v. Strouth, 620 S.W.2d 467 (Tenn. 1981); State v. Coleman, 619 S.W.2d 142 (Tenn. 1981); State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981); State v. Johnson, 632 S.W.2d 542 (Tenn. 1982).

III.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED PETITIONER'S CONTENTION THAT HE WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S JURY CHARGE ON PREMEDITATED MURDER AFTER THE TRIAL COURT HAD INFORMED COUNSEL PRIOR TO THE JURY VOIR DIRE THAT PREMEDITATED MURDER WOULD NOT BE CHARGED.

The petitioner contends that he was denied due process by the trial court's jury charge on premeditated murder after the trial court had informed counsel prior to jury voir dire that premeditated murder would not be charged. The Supreme Court of Tennessee fully considered and rejected this contention, finding that

> [t]he State did not examine the jury on premeditation. Defendant has cited no authority nor suggested how he was prejudiced by the failure to examine the jury on premeditation or what the examination would have involved. The proof in this case on the element of premeditation was known in advance and consisted of defendant's written and taped statements, plus the dual cause of death, to wit:

> strangulation and stabbing. In our opinion, any emphasis on premeditation during voir dire would not have been advantageous to defendant. We find no merit in this issue and it is overruled.

655 S.W.2d at 912. The respondent submits that this conclusion is supported by the record and, therefore, the allegation does not merit the granting of certiorari.

IV.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED PETITIONER'S CONTENTION THAT HE WAS DENIED AN IMPARTIAL JURY AS A RESULT OF THE STATE'S JURY VOIR DIRE ON THE ISSUE OF INSANITY.

The petitioner contends that he was denied an impartial jury as a result of the prosecutor's jury voir dire on the issue of insanity. The Supreme Court of Tennessee fully considered and rejected the petitioner's contention, concluding that the State's questioning did not result in any commitment beyond the appropriate willingness of the jury to decide the issue of insanity on all of the evidence adduced at trial, free of any preconceived notion that the mere fact of harming an eight-year-old child constituted prima facie evidence justifying a presumption of insanity. 655 S.W.2d at 911. The respondent submits that this conclusion is supported by the record, and, therefore, this allegation does not merit the granting of certiorari.

V.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND PROPERLY REJECTED THE PETITIONER'S COMPLAINT THAT HE WAS DENIED AN IMPARTIAL JURY BY THE FAILURE OF THE TRIAL COURT TO ALLOW INDIVIDUAL AND SEQUESTERED VOIR DIRE.

The petitioner contends that he was denied an impartial jury by the failure of the trial court to allow individual and

sequestered voir dire. The Supreme Court of Tennessee rejected this contention, finding that nothing inflammatory or prejudicial was revealed during the voir dire, that an impartial jury, uninfluenced by any pre-trial publicity or any information imparted to the jury venire during voir dire, was selected, and that the trial judge did not abuse his discretion in denying individual voir dire. 655 S.W.2d at 910-911. The respondent submits that these conclusions are supported by the record and, therefore, the allegation does not merit the granting of certiorari.

VI.

THE SUPREME COURT FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S CONTENTION THAT HE WAS SUBJECTED TO DOUBLE JEOPARDY BY CONVICTION OF BOTH FELONY MURDER AND THE UNDERLYING FELONY.

The petitioner contends that he was subjected to double jeopardy by his dual convictions for first degree murder and aggravated rape. He argues that his murder conviction was for felony murder (in the perpetration of aggravated rape), precluding a conviction for aggravated rape. See Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). The respondent submits that the indictment charged the petitioner with first degree murder in common law form and first degree murder in the perpetration of aggravated rape. The jury returned a general verdict of "guilty of murder in the first degree as charged in the indictment." Under Tennessee law, "a general verdict of guilty will be sustained if there is any one good count in the indictment sustained by proof, although the other counts may be fatally defective." Tenn. Code Ann. § 40-18-111. Thus, assuming sufficiency of the evidence as to common-law murder, the general verdict properly may be related to that charge with the result that the conviction could be upheld for first degree murder and aggravated rape, precluding any double jeopardy problem. Briggs v. State, 573 S.W.2d 157, 158 (Tenn. 1978). As the

Supreme Court of Tennessee found, the record contains proof of common law murder beyond a reasonable doubt. 655 S.W.2d at 912. The record supports that finding. Both convictions for common law murder and aggravated rape may stand. This allegation does not merit the granting of certiorari.

VII.

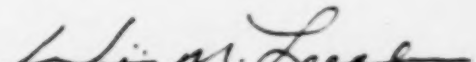
THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED PETITIONER'S CONTENTION THAT HE WAS DENIED A FAIR TRIAL BY THE STATE'S PLAYING DURING CLOSING ARGUMENT A RECORDING OF PETITIONER'S CONFESSION.

The petitioner contends that he was denied a fair trial by the playing of his recorded confession during closing argument. The Supreme Court of Tennessee, while finding that the playing of the tape violated state procedural law, held that any error was harmless beyond a reasonable doubt in view of the overwhelming evidence of guilt. 655 S.W.2d at 912. The respondent submits that the record supports that finding and, therefore, this allegation does not merit the granting of certiorari.

CONCLUSION

For these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,



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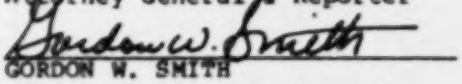

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